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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF NEVADA

15 WELLS FARGO BANK, N.A., AS TRUSTEE)
 16 FOR THE REGISTERED HOLDERS OF)
 17 BANC OF AMERICA COMMERCIAL)
 18 MORTGAGE INC., COMMERCIAL)
 19 MORTGAGE PASS-THROUGH)
 20 CERTIFICATES, SERIES 2004-5,)

CASE NO. 2:12-cv-01521-RCJ-CWH

PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Plaintiff,

v.

DANIEL J. ELEFANTE, an individual, and
 THEODORE H. TOCH, an individual,

Defendants.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of Banc of America Commercial Mortgage Inc., Commercial Mortgage Pass-Through Certificates, Series 2004-5 ("Plaintiff" or "Trustee"), via its Special Servicer, Torchlight Loan Services LLP, requests that the Court grant partial summary judgment in its favor against Daniel J. Elefante and Theodore H. Toch (collectively, "Guarantors") for breach of a personal guaranty. This Motion is made and based on the following memorandum of points and authorities, the Declaration of Daniel Greenholtz attached hereto as Exhibit 1, the attached exhibits, the papers and pleadings on file, and any oral

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1 argument the Court may deem necessary.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 This case involves Trustee's enforcement of a personal guaranty for which full
5 recourse against Guarantors was triggered when Borrower filed for bankruptcy
6 protection. Via this motion, Trustee seeks partial summary judgment on the issue of
7 liability, leaving the question of damages in dispute.

8 As will be demonstrated below, it is factually undisputed that Guarantors
9 personally guaranteed a non-party borrower's performance of all obligations and
10 liabilities for which that borrower is personally liable under Section 12.1 of the
11 applicable Loan Agreement (as defined below). When Borrower filed its voluntary
12 Chapter 11 bankruptcy petition, Borrower triggered the full recourse obligations of
13 the Guarantors. Guarantors have not satisfied their obligations under the Guaranty.

14 For the reasons set forth below, there is no reason to delay issuance of partial
15 summary judgment by finding that Guarantors signed a valid contract, their
16 obligations under that contract were triggered by Borrower's bankruptcy filing,
17 Guarantors did not satisfy their obligations under the Guaranty, and therefore,
18 Guarantors are in breach of their Guaranty. Stated another way, Trustee is entitled
19 to partial summary judgment on the issue of liability.

20 **II. STATEMENT OF UNDISPUTED FACTS**

21 The following material facts entitling Trustee to the relief requested are
22 undisputed:

23 **A. The Loan Documents**

24 1. On or about June 1, 2004, Summit Plaza Storage Partners, LLC
25 ("Borrower") borrowed \$4,100,000 (the "Loan") from General Electric Capital
26 Corporation ("Original Lender"). (See Exhibit 1 at ¶ 4.)
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28

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1 2. The Loan is evidenced by a Promissory Note dated June 1, 2004 and
2 made by Borrower to Original Lender (as amended, assigned or otherwise modified,
3 the "Note"). (See Exhibit 1-A.)

4 3. Guarantors, as managers for Borrower, signed the Note. (See id.)

5 4. The Loan is secured by, among other things, a Deed of Trust,
6 Assignment of Leases and Rents, Security Agreement and Fixture Filing dated
7 June 1, 2004, executed by Borrower, as grantor, to First American Title Insurance
8 Company, as trustee, for the benefit of Original Lender (as amended, assigned or
9 otherwise modified, the "Deed of Trust"), and an Assignment of Leases and Rents
10 dated June 1, 2004, executed by Borrower in favor of Original Lender (as amended,
11 assigned or otherwise modified, the "ALR"). (See Exhibits 1-D and 1-E.)

12 5. The Deed of Trust encumbers certain personal and real property
13 collectively defined as the "Property" therein. (See Exhibit 1-D.) The Property
14 includes, among other things, certain land, improvements, real and personal property
15 and rents and leases ("Leases") and all of Borrower's estate right, title and interest
16 therein. (See id.)

17 6. The Leases include all rents, revenues, issues, income, proceeds, profits
18 and all other payments arising from the Property. (See id.)

19 7. The Deed of Trust also encumbers all accounts, including reserves,
20 escrows or impounds accounts with respect to the Property. (See id.)

21 8. The Loan is further evidenced by a Loan Agreement dated June 1, 2004,
22 executed by Borrower and Original Lender (the "Loan Agreement"). (See Exhibit 1-
23 B.)

24 9. Guarantors, as managers for Borrower, signed the Loan Agreement.
25 (See id.)

26 10. To further secure Borrower's obligations under the Loan, on or about
27 June 1, 2004, Guarantors guaranteed the Loan by signing a Joinder (as amended,
28 assigned or otherwise modified, the Joinder is referred to in this motion as the

1 “Guaranty”, and collectively with the Note, the Deed of Trust, the ALR, and the Loan
2 Agreement, the “Loan Documents”). (See Exhibit 1-C.)

3 11. Trustee is the current holder of the Loan Documents. (See Exhibits 1-A
4 to F.)

5 **B. Relevant Provisions in the Guaranty and Loan Documents.**

6 12. Section 10.1 of the Loan Agreement states in part:

7 Upon the occurrence of any Event of Default described in
8 Section 9.7 [the filing of an involuntary bankruptcy or
9 similar proceeding] or 9.8 [the filing of a voluntary
10 Bankruptcy Petition], all amounts due under the Loan
11 Documents immediately shall become due and payable, all
12 without written notice and without presentment, demand,
13 protest, notice of protest or dishonor, notice of intent to
14 accelerate the maturity thereof, notice of acceleration of the
15 maturity thereof, or any other notice of default of any kind,
16 all of which are hereby expressly waived by Borrower

13 (See Exhibit 1-B at § 10.1.) (Modification added).

14 13. Section 12.1 of the Loan Agreement states in part:

15 Except as provided below, Borrower shall not be personally
16 liable for amounts due under the Loan Documents.
17 Borrower shall be personally liable to Lender for any
18 deficiency, loss or damage suffered by Lender because
19 of: . . . (m) the filing by Borrower or any of its members,
20 partners, or shareholders, or the filing against Borrower, of
21 a petition under the United States Bankruptcy Code or
22 similar state insolvency laws

20 (See id. at § 12.1.)

21 14. Thus, if Borrower filed for bankruptcy, that act was an Event of Default
22 under the Loan Agreement. (See id. at § 9.8.)

23 15. Borrower’s filing for bankruptcy would make all amounts it owed under
24 the Loan Documents immediately due and payable. (See id. at § 10.1.)

25 16. Borrower’s filing for bankruptcy would also make Borrower personally
26 liable for all amounts due under the Loan Documents. (See id. at § 12.1.)
27
28

1 17. Per the Guaranty, Guarantors agreed to “jointly and severally guaranty
2 the performance by Borrower of all obligations and liabilities for which Borrower is
3 personally liable under Section 12.1 of this Agreement.” (See Exhibit 1-C.)

4 18. The Guaranty “is a guaranty of full and complete payment and
5 performance and not of collectability.” (See *id.*)

6 19. Guarantors “agree[d] that [their] obligations under this [Guaranty] shall
7 be primary, absolute and unconditional, and that [their] obligations under this
8 [Guaranty] shall be unaffected by any of such rights or defenses, including: (a) the
9 unenforceability of any Loan Document against Borrower and/or any other Joinder
10 Party; . . . (c) the existence of any collateral or other security for the Loan, and any
11 requirement that Lender pursue any of such collateral or other security, or pursue
12 any remedies it may have against Borrower and/or any other Joinder Party; . . . (h)
13 any voluntary or involuntary bankruptcy, receivership, insolvency, reorganization or
14 similar proceeding affecting Borrower or any of its assets.” (See *id.* at §§ 1(a), (c), and
15 (h).)

16 20. In other words, the Guarantors agreed, notwithstanding the existence of
17 collateral securing the loan, that their liability under the Guaranty is absolute.

18 **C. Borrower’s Default and Filing of Bankruptcy Petition**

19 21. Under the terms of the Loan Agreement, the Loan matured on July 1,
20 2011 (the “Maturity Date”). (See Exhibit 1-B at §§ 1.1 & 2.3(b).)

21 22. Borrower committed several Events of Default under the Loan
22 Documents, including, among other things, failure to pay the Trustee the full
23 amount due and unpaid under the Loan Documents by the Maturity Date. (See
24 Exhibit 1 at ¶ 10.)

25 23. Borrower and Guarantors also signed a Prenegotiation Agreement in
26 September 2011, by which they acknowledged that the Loan was in Default. (See
27 Dkt. No. 15 at Ex. J.)

28

24. Trustee, in order to commence a non-judicial foreclosure against the Property pursuant to NRS Chapter 107, caused a Notice of Default and Election to Sell under Deed of Trust to be recorded in the Official Records on March 28, 2012 as Instrument No. 201203280003092 (the "Default Notice"). (See Exhibit 1-G.)

25. On May 4, 2012, Borrower filed a petition under Chapter 11, Title 11, of the United States Bankruptcy Code. (See Exhibit 1 at ¶ 12; see also Dkt. No. 15 at Ex. G.)

III. LEGAL ARGUMENT

A. Applicable Standard

"The court shall grant [partial] summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (modification added). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a summary judgment motion, "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise supported motion for summary judgment." Anderson, 477 U.S. at 256. Once the moving party has carried its burden of showing that no material fact is in dispute, "the party opposing the motion 'may not rest upon the mere allegations or denials in his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial.'" Id. at 248. A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts,' . . . and [it] 'may not rely on conclusory allegations or unsubstantiated speculation.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Scope of this Motion.

Notably, Trustee reiterates what it is not seeking by way of this Motion.

1 Trustee has been involuntarily required to defend itself in Borrower's Chapter 11
 2 case, Case No. 12-154002-BTB, pending in the U.S. Bankruptcy Court, District of
 3 Nevada before the Honorable Bruce Beesley. That case remains pending and, most
 4 recently, Borrower has appealed two adverse rulings which will require Trustee to
 5 expend further resources to protect its legal, contractual rights. Guarantors may
 6 wish to confuse this Court by suggesting there is no liability, or any ruling should be
 7 stayed until Borrower's bankruptcy case is concluded. This is precisely why Trustee,
 8 by the instant Motion, seeks only a finding of liability at this time. Granting this
 9 request will narrow the issues to be tried, and allow this case to proceed in a more
 10 orderly and streamlined manner.

11 **C. Guarantors Are in Breach of Contract.**

12 In Nevada, "[t]he question of the interpretation of a contract when the facts
 13 are not in dispute is a question of law." Grand Hotel Gift Shop v. Granite St. Ins.,
 14 108 Nev. 811, 839 P.2d 599, 602 (1992). "A guaranty is a contract 'like all other
 15 contracts.'" Blue Hills Office Park, LLC v. J.P. Morgan Chase Bank, 477 F. Supp. 2d
 16 366, 380-81 (D. Mass. 2007) (citations omitted) (holding that the guarantor was
 17 liable for the full amount of the debt due to the borrower's failure to maintain its
 18 SPE status); see also CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB
 19 Rental I, LLC, 980 A.2d 1, 410 N.J. Super. 114 (2009) (holding that defendants were
 20 liable on a guaranty for taking out a loan encumbering the property without the
 21 plaintiff's written consent as required by the loan documents).

22 The elements of a breach of contract claim in Nevada are straightforward. "To
 23 prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence
 24 of a valid contract; (2) a breach by the defendant; and (3) damages resulting from
 25 defendant's breach." Keife v. Metro. Life Ins. Co., 797 F. Supp. 2d 1072, 1076 (D.
 26 Nev. 2011) (citations omitted).

27 Here, the first two elements have been satisfied as a matter of law.
 28 Guarantors signed the Guaranty (which is a contract), Original Lender performed its

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obligations under the Guaranty by funding the Loan, Borrower filed a petition under Chapter 11, Title 11, of the United States Bankruptcy Code, thus triggering Guarantors' obligations, and Guarantors breached the Guaranty by failing to satisfy their obligations under the Guaranty. The third element is not at issue on this motion.

1. A valid contract exists between Trustee and Guarantors.

Guarantors admit the existence of the Guaranty, Loan Agreement, and other Loan Documents as contracts and attached them as exhibits to their Motion to Dismiss. See Dkt. No. 15 at 2:18–3:5¹ and Exhibits A–D. Guarantors also admit that “[Trustee] has correctly cited that the Guarantors have agreed to guarantee ‘the performance by Borrower [Summit Plaza] of all obligations and liabilities for which the Borrower is personally liable under Section 12.1 of this [Loan] Agreement.’” See Dkt. No. 15 at 5:19–21. Finally, Guarantors admit that they signed the Guaranty. See id. at 3:2–5 (“[T]he defendants (Elefante and Toch) signed a ‘Joinder’ to the Loan Agreement, jointly and severally guaranteeing ‘the performance by Borrower of all obligations and liabilities *for which Borrower is personally liable* under Section 12.1 of this Agreement.’” (emphasis in original) (footnote omitted)).

Additionally, in a letter dated October 26, 2011, Guarantors acknowledged the Loan matured on July 1, 2011 and proposed a loan modification. See id. at Exhibit E. Then, on or around September 2011, Guarantors signed a Prenegotiation Agreement “to engage in discussions with Lender relating to potential material modifications of the Loan and any liability which may exist under the Loan Documents,” among other things. See id. at Exhibit J. Guarantors signed on behalf of the defaulted Borrower and individually as Guarantors. Id. Guarantors do not deny the existence of these valid contracts. As such, there is no question that

¹ Citation refers to page number and line number. For example, “2:18” refers to page number 2 and line number 18.

1 Trustee and Guarantors are parties to a valid contract. See May v. Anderson, 121
 2 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

3 **2. Guarantors breached the Guaranty and other Loan Documents.**

4 Pursuant to the Guaranty, Guarantors “jointly and severally guaranty the
 5 performance by Borrower of all obligations and liabilities for which Borrower is
 6 personally liable under Section 12.1 of this Agreement.” See Exhibit 1-C. Under
 7 Section 12.1 of the Loan Agreement, “Borrower shall be personally liable to Lender
 8 for any deficiency, loss or damage suffered by Lender because of: . . . (m) the filing by
 9 Borrower or any of its members, partners, or shareholders, or the filing against
 10 Borrower, of a petition under the United States Bankruptcy Code or similar state
 11 insolvency laws” See Exhibit 1-B at § 12.1. In other words, pursuant to Section
 12 12.1 of the Loan Agreement, Borrower shall be personally liable under certain
 13 circumstances, including Borrower’s filing of a bankruptcy petition. See id.
 14 Pursuant to Section 10.1 of the Loan Agreement, if Borrower files a voluntary
 15 bankruptcy petition, all amounts due under the Loan Documents immediately shall
 16 become due and payable. See id. at § 10.1. Furthermore, all amounts due under the
 17 Loan Documents were already due and payable when the Loan matured on July 1,
 18 2011 and Borrower failed to pay Trustee the full amount due and unpaid under the
 19 Loan Documents. See id. at §§ 1.1 & 2.3(b); Exhibit 1 at ¶ 10.

20 On May 4, 2012, Borrower filed a petition under Chapter 11, Title 11, of the
 21 United States Bankruptcy Code. See Exhibit 1 at ¶ 12; see also Dkt. No. 15 at
 22 Exhibit G. As a result of Borrower’s bankruptcy filing, Guarantors obligations under
 23 the Guaranty were triggered. See Exhibit 1-B at § 12.1 and Exhibit 1-C. Since
 24 Guarantors jointly and severally guaranteed, among other things, “the performance
 25 by Borrower of all obligations and liabilities for which Borrower is personally liable
 26 under Section 12.1 of this Agreement,” Guarantors breached the Guaranty and other
 27 Loan Documents by failing to satisfy their obligations under the Guaranty. See
 28 Exhibit 1-C.

1 Further, Guarantors “agree[d] that [their] obligations under this [Guaranty]
 2 shall be primary, absolute and unconditional, and that [their] obligations under this
 3 [Guaranty] shall be unaffected by any of such rights or defenses, including [among
 4 other things] any voluntary or involuntary bankruptcy, receivership, insolvency,
 5 reorganization or similar proceeding affecting Borrower or any of its assets.” See
 6 Exhibit 1-C at § 1(h).

7 **3. Guarantors are liable for their breach of contract.**

8 According to the Guaranty and the clear wording of Sections 9.8, 10.1, and
 9 12.1 of the Loan Agreement, Borrower’s bankruptcy filing imposes personal liability
 10 on Guarantors. See Exhibit 1-C and Exhibit 1-B at §§ 9.8, 10.1 and 12.1. While
 11 Guarantors have argued that their obligations under the Guaranty should be
 12 imposed only when Borrower’s bankruptcy filing causes Trustee to suffer deficiency,
 13 loss, or damage (Dkt. No. 15 at 7:24–8:2), Guarantors ignore the fact that the full
 14 amount owed came due, and that they did not pay it. See Exhibit 1 at ¶ 13. As such,
 15 Guarantors are in breach of contract.²

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26 ² Here, there is no distinction among the words deficiency, loss, or damage
 27 because the full amount under the loan is due, guarantors have not paid it.
 28 Guarantors also expressly waived any defenses relating to the existence of collateral
 that might be tied up in ongoing bankruptcy proceedings. See Exhibit 1-C at § 1.

1 IV. CONCLUSION

2 Guarantors guaranteed, among other things, Borrower's performance of all
3 liabilities and obligations for which Borrower is personally liable. When Borrower
4 filed its voluntary bankruptcy petition, Borrower already owed the full amount due
5 and unpaid under the Loan Documents because Borrower failed to pay Trustee those
6 amounts by the Maturity Date. Additionally, upon Borrower's filing of its voluntary
7 bankruptcy petition, Guarantors obligations under the Guaranty were triggered and
8 Borrower became personally liable to Trustee. Guarantors' liability under the
9 Guaranty is undisputed. While the parties use the remainder of the discovery period
10 to ascertain damages, there is no reason to delay a finding of liability.

11 For these reasons, Trustee requests that the Court grant this motion for
12 partial summary judgment.

13 Dated: March 7, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 7th day of March 2013 and pursuant to Fed. R. Civ. P. 5(b), I served via CM/ECF and/or deposited for mailing in the U.S. Mail a true and correct copy of the foregoing Plaintiff's Motion for Partial Summary Judgment, postage prepaid and addressed to the following:

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